IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-5382

WILLIE JASPER DARDEN,

Petitioner,

against

STATE OF FLORIDA,

Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

BRIEF OF RESPONDENT

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AUTHORITIES CITED

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PRELIMINARY STATEMENT

All references to the Appendix will be made by the use of the prefix "A" followed by the appropriate page number.

References to the original transcript of trial testimony will be made by use of the symbol "R" followed by the appropriate page number.

Pursuant to Rule 40, Rules of the United States Supreme Court, respondent will not include in this brief: (1) references to the official report of the court below; (2) a jurisdictional statement; or (3) a reference to statutes involved in the case.

QUESTION PRESENTED

As phrased in this Court's order of January 10, 1977, the question is: Whether the prosecutor's summation to the jury in the circumstances of this case deprived petitioner of due process of law.

STATEMENT OF THE CASE

On the evening of September 8, 1973, Mrs. Helen Turman was present in her furniture store located in Lakeland, Florida (A-24; R-Vol.IV, p. 202). She was alone (A-24). Some time between 5:00 p.m. and 6:00 p.m., Mrs. Turman opened the *back door* of the store and confronted petitioner. He told her that he wanted to look at approximately $600.00 worth of furniture for some furnished apartments (A-24). Mrs. Turman showed him some couches and bedding (A-25). Apparently petitioner then departed the store, telling Mrs. Turman that his wife would be back, presumably to inspect the same items he had been shown (A-26). Petitioner then returned and asked to see some ranges and stoves (A-26). Mrs.

Turman complied with his request, and in response to an inquiry of price, she started toward her adding machine (A-26). At that point, petitioner grabbed Mrs. Turman's right arm, stuck a gun in her back, and told her to, "Do as I say and you won't get hurt." (A-26). Petitioner then pulled down a loading door and told Mrs. Turman to fasten the glass sliding door through which he entered and not to try anything funny (A-26). He then took Mrs. Turman to the cash register and told her to open it (A-26). After she did this, she was told to back up against a refrigerator. Petitioner then emptied the cash register of all bills, the amount of which was not more than $15.00 (A-27). Petitioner then told Mrs. Turman to proceed toward the back of the store. At that time, Mrs. Turman was getting

weak in the knees and thought she was going to fall (A-27). Petitioner ordered her to stand up and keep going (A-27). The pair proceeded to the back of the store where some box springs and mattresses were stacked against the wall (A-27). At that moment, Mrs. Turman's husband appeared at the back door, was warned by his wife not to come in, and was immediately shot between the eyes (A-27,28). Petitioner then stepped in front of Mrs. Turman, pointed the gun at her, and ordered her to "Stand still, don't move." (A-28). While holding the gun on Mrs. Turman, petitioner went over to her husband's body and pulled it halfway into the building (A-28). Petitioner then attempted to close the door, but was unable since one of Mr. Turman's feet was in the way (A-28). He then returned to Mrs.

Turman and told her to get down on the floor (A-28). She sat down on the floor, approximately four to five feet from her dead or dying husband (A-29). As he was unzipping his pants and undoing his belt buckle, petitioner told Mrs. Turman to take her teeth out and suck his penis (A-29). Mrs. Turman cried, "Lord, have mercy." (A-29). Again, she cried, "Lord, have mercy,", and thereupon, petitioner told her to get up (A-29). As petitioner was taking Mrs. Turman back toward the front of the store, a neighbor and part-time employee, Phillip Arnold, shoved the back door open (A-29). Mrs. Turman screamed to Phillip Arnold to go back (A-30).

As Phillip Arnold arrived at the back door, he could see Mr. Turman's body lying partially in the store (A-66). Mr.

Turman was bleeding "real bad" from the forehead (A-66). Although he heard Mrs. Turman's warning, Phillip Arnold did not know what she meant (A-67). He observed Mrs. Turman and petitioner in the store and asked petitioner to help him move Mr. Turman out of the rain (A-67). Petitioner replied, "Sure, buddy, I'll help you." (A-67,68). Phillip Arnold then squatted over the body, and as he looked up, petitioner was standing over him with a gun in his face (A-67). Petitioner then pulled the trigger, and the gun "clicked." (A-69). Petitioner pulled the trigger again and shot Phillip Arnold in the mouth (A-69). Phillip Arnold then started to run away from the store, and petitioner shot him in the neck (A-69). While still running away from the store, Phillip Arnold was shot

yet a third time in the side (A-69). Petitioner then left the store.

Evidence of petitioner wrecking his automobile is properly stated in his brief. Respondent accepts that statement relative to the accident, with the additional comment that the probable murder weapon was found 39 feet from the scene of that accident. While it is true that expert testimony could not conclusively show that the gun found was the same one used, it was nonetheless shown that the recovered weapon was a .38 caliber revolver which had been modified to use .38 special cartridges (R-Vol.V, p. 346). Because of this modification, it was impossible to scientifically prove that the bullets recovered were fired from that gun. Additionally, the gun had a misaligned cylinder so that when fired, a portion of

the bullet would be shaved (R-Vol.V, p. 349). However, evidence did show that the cartridges, both live and spent, found in the gun were arranged and situated so that if someone had taken the gun and reconstructed the shots at the killing, the hammer-to-bullet relationship would be (and was) identical (R-Vol.IV, pp. 521, 522,537,542).

SUMMARY OF THE ARGUMENT

Since the issue of the prosecutor's closing argument was not presented as a federal question to the Florida Supreme Court, this Court is without jurisdiction. By failing to properly object to the closing arguments, petitioner waived any right to claim error. Even if this issue were properly preserved and presented, the particular remarks

alleged as objectionable by petitioner were not sufficiently prejudicial to deprive him of his constitutional right to either a fair trial or due process of law.

ARGUMENT

THE JUDGMENT IS NOT INVALID ON THE GROUNDS THAT THE PROSECUTOR'S CLOSING ARGUMENT WAS INFLAMMATORY AND PREJUDICIAL.

Petitioner claims that he was deprived of his federal constitutional right to a fair trial because of the closing arguments presented by the prosecutor.

We begin with the observation that this issue has not been postured in terms of federally protected rights until here and now in this Court. Neither at trial nor on direct appeal to the Florida Supreme Court did petitioner claim that the remarks contained in the closing arguments violated his federal constitutional right to a fair trial. Indeed, in his appearance before that tribunal, petitioner presented the Florida Supreme

Court with argument which discussed and was directed only to an alleged violation of settled Florida state law.

Accordingly, as is obvious by its decision, the Florida Supreme Court decided the issue by principles established under Florida law. Notably, in addition to holding that the remarks did not deprive petitioner of a fair trial, the Florida Supreme Court utilized well-established state law that in the absence of an objection to a prosecutor's argument appellate review of that argument will not be had, citing *State v. Jones*, 204 So.2d 515 (Fla. 1967). The Florida Supreme Court did nothing more than courts in several other jurisdictions have done regarding the issue of closing argument. See, e.g., *People v. Jordan*, 172 N.W.2d 495 (Mich.App. 1969); *People*

v. Brosman, 298 N.E.2d 78 (N.Y. 1973); *People v. Prim*, 289 N.E.2d 601 (Ill. 1972), *cert. den.*, 412 U.S. 918; *People v. Jennings*, 296 N.E.2d 19 (Ill.App. 1973); *People v. Hill*, 240 N.E.2d 801 (Ill.App. 1968), *cert. den.*, 395 U.S. 984; *People v. Modesto*, 427 P.2d 788 (Calif. 1967), *cert. den.*, 389 U.S. 1009; *Schneider v. State*, 501 P.2d 868 (Okla.App. 1972); *Thames v. State*, 453 S.W.2d 495 (Tex.App. 1970); *Mitchell v. State*, 277 So.2d 395 (Ala.App. 1973); *State v. Cuchinelli*, 261 So.2d 217 (La. 1972); *Myers v. State*, 268 So.2d 353 (Miss. 1972).

Consequently, respondent submits that although the issue was decided below, it was disposed of on state grounds and not in consideration of the federal constitution. Respondent therefore submits that since the federal question was neither

raised nor decided in the court below, this Court lacks the jurisdiction to review the matter. *Cardinale v. Louisiana*, 394 U.S. 437 (1969).

Alternatively, even if the Court were to consider that the federal question was properly raised and decided below, respondent quickly points out, as was observed by the Florida Supreme Court, that the record is void of a specific objection to the arguments of the prosecutor, at least on the basis of prejudicial or inflammatory substance.

The two instances in which petitioner made "objections" during the closing argument of the prosecutor appear in the record thusly:

> "This sponsor, otherwise his girl friend, knew that he was a criminal--prisoner, I'm sorry, prisoner; knew, let him bring the gun into her house while he was on weekend furloughs.
>
> "MR. GOODWILL: Now, I object. There's been no testimony of this.
>
> "MR. McDANIEL: I'm sorry, I believe Mr. Darden testified to it.
>
> "MR. GOODWILL: I don't believe so.
>
> "THE COURT: The jury are the judges of the evidence. As I told you before, ladies and gentlemen, you are the sole judges. Your memory of the evidence is what counts. Proceed, sir." A-122

Obviously, this objection was directed to a statement which petitioner alleged was without testimonial basis; an instruction followed.

The second instance in which petitioner's counsel objected appears as follows:

> "MR. MALONEY: Your Honor, that's about the fifth time that he has commented he wished someone would shoot this man or that he would kill himself. I wish the Court would instruct Mr. McDaniel to stick with what little evidence he has.

"MR. McDANIEL: You don't have any evidence yourself, Mr. Maloney.

"THE COURT: All right, gentlemen. Proceed with your argument. Objection will be overruled. Go ahead, sir." A-136

It is interesting that this statement is not in the form of an objection on the grounds of inflammatory or prejudicial remarks, but rather it is an expressed desire that the trial court instruct the prosecutor to confine his remarks to the evidence.

Accordingly, respondent submits that if constitutional error occurred it was waived by petitioner's failure to timely object. *Estelle v. Williams*, __U.S.__, 48 L.Ed.2d 126 (1976).

In *Estelle, supra*, the petitioner alleged that he was unlawfully convicted in that he was tried in prison clothing. Neither petitioner nor his attorney objec-

ted in the trial court. On appeal the Texas Court of Criminal Appeals affirmed the conviction. Williams then sought habeas corpus relief in the federal district court claiming he was denied a fair trial. The district court agreed that to try petitioner in prison garb was inherently unfair but that the error was harmless. The United States Court of Appeals, Fifth Circuit, reversed the district judge's holding that the error was harmless and ordered that the writ should issue. This Court granted a writ of certiorari and reversed the Court of Appeals. Justice Burger, speaking for six members of the Court (Justice Stevens did not participate), held Williams was not entitled to habeas corpus relief because he did not timely object to being tried in prison clothes. The Court said:

* * *

"Nothing in this record, therefore, warrants a conclusion that respondent was compelled to stand trial in jail garb or that there was sufficient reason to excuse the failure to raise the issue before trial.[9] Nor can the trial judge be faulted for not asking the respondent or his counsel whether he was deliberately going to trial in jail clothes. To impose this requirement suggests that the trial judge operates under the same burden here as he would in the situation in *Johnson v. Zerbst*, 304 U.S. 458 (1938), where the issue concerned whether the accused willingly stood trial without the benefit of counsel. *Under our adversary system, once a defendant has the assistance of counsel the vast array of trial decisions, strategic and tactical, which must be made before and during trial rests with the accused and his attorney. Any other approach would rewrite the duties of trial judges and counsel in our legal system.*

"Accordingly, although the State cannot, consistent with the Fourteenth Amendment, compel an accused to stand trial before a jury while dressed in identifiable prison clothes, *the failure*

to make an objection to the court as to being tried in such clothes, for whatever reason, is sufficient to negate the presence of compulsion necessary to establish a constitutional violation.

"[9]It is not necessary, if indeed it were possible, for us to decide whether this was a defense tactic or *simply indifference* . . . ." 48 L.Ed.2d at 135 (emphasis added)

Mr. Justice Powell in his concurring opinion said:

* * *

"As relevant to this case, there are two situations in which a conviction should be left standing despite the claimed infringement of a constitutional right. The first situation arises when it can be shown that the substantive right in question was consensually relinquished. The other situation arises when a defendant has made an 'inexcusable procedural default' in failing to object at a time when a substantive right could have been protected. Hart, Foreword: The Time Chart of the Justices, 73 Harv. L. Rev. 84, 118 (1959); see ABA Project on Minimum Standards for Criminal Justice, Standards

Relating to Post-Conviction Remedies at 35-36.

"Williams was represented by retained, experienced counsel. It is conceded that his counsel was fully aware of the 'prison garb' issue and elected to raise no objection simply because he thought objection would be futile. The record also shows that the state judge who presided at Williams' trial 'had a practice of allowing defendants to stand trial in civilian clothing, if requested. . . .' 346 F.Supp., at 343. It thus is apparent that had an objection been interposed by Williams to trial in prison garb, the issue here presented would not have arisen.

"This case thus presents a situation that occurs frequently during a criminal trial--namely, a defendant's failing to object to an incident of trial that implicates a constitutional right. As is often the case in such situations, a timely objection would have allowed its cure. As is also frequently the case with such trial-type rights as that involved here, counsel's failure to object in itself is susceptible to interpretation as a tactical choice. *Ante*, at 7.

It is my view that a tactical

choice or procedural default of the nature of that involved here ordinarily should operate, as a matter of federal law, to preclude the later raising of the substantive right. We generally disfavor inferred waivers of constitutional rights. See *Johnson v. Zerbst, supra*, at 464; 525-526 (1972). *That policy, however, need not be carried to the length of allowing counsel for a defendant deliberately to forego objection to a curable trial defect, even though he is aware of the factual and legal basis for an objection, simply because he thought objection would be futile."* 48 L.Ed.2d at 136-137. (emphasis added).

In *Francis v. Henderson*, __U.S.__, 48 L.Ed.2d 149 (1976), decided on the same day as *Estelle, supra*, this Court denied habeas corpus relief where petitioner alleged that Negroes were systematically excluded from the grand and petit jury but did not move to quash prior to trial as required by state law. This Court noted that to allow a claim to

be raised belatedly:

> "'. . . *would militate in favor of delaying the raising of the claim in hopes of an acquittal, with the thought that if those hopes did not materialize, the claim could be used to upset an otherwise valid conviction at a time when reprosecution might well be difficult . . . .*'" (emphasis added)
> 48 L.Ed.2d at 153

In *State v. Jones, supra,* the Florida Supreme Court, in requiring a timely objection, made the identical observation, saying:

> ". . . This [failure to object] made it possible for defense counsel to stand mute if he chose to do so, knowing all the while that a verdict against his client was thus tainted and could not stand. By such action defendants had nothing to lose and all to gain, for if the verdict be 'not guilty' it remained unassailable."
> 204 So.2d at 518

Respondent considers the above principle as the fundamental concept of appellate review. Paraphrased, it stands for

the proposition that if basic rights are to be safeguarded, alleged violations of those rights *must* be raised. It is this requirement which constitutes the defendant's obligation in the total scheme of fairness. Undoubtedly, it is the very basic function of the adversary system. Had petitioner objected on the basis of inflammatory argument, he would have afforded the trial court the opportunity to appropriately instruct the jury or do whatever was indicated. By failing to pointedly object at the earliest moment he considered the remarks to be inflammatory, petitioner prohibited any curative instructions.

Interestingly, some of the cases upon which petitioner relies indicate that at the time improper argument was made some form of an objection was made by the

defendant. In *Frazier v. Cupp*, 394 U.S. 731 (1969), for example, a mistrial was requested. In *Berger v. United States*, 295 U.S. 78 (1935), a proper objection was raised. The one case upon which petitioner relies and in which no objection was made is *Malley v. Connecticut*, 414 F.Supp. 1115 (1976). There, the district court specifically referred to the failure to object but opined that it would still review the issue since the Connecticut Supreme Court did address the constitutional claim on the merits. Such is not the case here.

Petitioner fully recognizes his failure to object but states that even if he had objected and even if curative instructions were given, they could not have undone the irreparable damage. He also acknowledges the trial court's

preliminary instructions relative to the purpose of closing arguments (A-103-104), (R-Vol.III, p. 186), but claims that nothing whatsoever could have eliminated the prejudicial effect on the jury. In other words, petitioner is saying that regardless of the preliminary instructions, and regardless of the intelligence of the jury, a verdict of guilty could have been returned *solely* on the strength of the closing arguments.

In support of his claim, petitioner has dissected the arguments into three specific areas of alleged wrongdoing and one general area designed as a catch-all for all other "improper forms of argument." Relying on less than applicable case authority, he tells of the many things the arguments constituted; however, after examining that authority, it becomes

clear what the arguments, in fact, were not.

For example, the remarks were not a misstatement of law and fact, *Bruce v. Estelle*, 483 F.2d 1031 (5th Cir. 1973). They were not structured so as to evoke racial bias, *United States ex rel. Haynes v. McKendrick*, 481 F.2d 152 (2d Cir. 1973). They were not indicative of evidence known to the prosecutor but not to the jury, *Hall v. United States*, 419 F.2d 582 (5th Cir. 1969); *Dunn v. United States*, 307 F.2d 883 (5th Cir. 1962). They were not an expression of personal belief based on the prosecutor's specialized training, *Greenburg v. United States*, 280 F.2d 472 (1st Cir. 1960). They were not an expression expecting future prosecution for crimes, *Manning v. Jarnigan*, 501 F.2d 408 (6th Cir. 1974).

The only conceivable portion of the closing arguments to which petitioner's citations might apply is that reflected in prosecutor White's remarks:

> "I am convinced, as convinced as I know I am standing before you today, that Willie Jasper Darden is a murderer, that he murdered Mr. Turman, that he robbed Mrs. Turman and that he shot to kill Phillip Arnold. I will be convinced of that the rest of my life." A-120

We dispute that the above-quoted remark resulted in the alleged harm. We dispute that a prosecutor's expression of personal belief in guilt, *without more*, is a *per se* violation of a federally protected right. It is one thing for the prosecutor to create the impression that due to his vast experience and training he believes a defendant guilty, *Greenburg v. United States, supra*. It is one thing for him to base his belief on evidence

not known to the jury, *Pointer v. Texas*, 380 U.S. 400 (1965) (violation of right to confrontation); but it is entirely a different matter when a prosecutor summarizes the evidence and then, relying on that evidence, tells a jury he is convinced of guilt. Such an innocuous remark does no violence to the federal constitution. *Cf. Lawn v. United States*, 355 U.S. 339 (1958). It constitutes nothing more than an expression of what the prosecutor believes the evidence has shown; it is exactly the same as a defense lawyer expressing his belief as to what it has not shown.

Based on its understanding of the issue, respondent contends that a closing argument is constitutionally improper and denies due process when it is:

(1) inflammatory[1]; (2) prejudicial; and (3) not supported by evidence presented to the jury.

We submit that all these factors must be present since an argument may be inflammatory but not prejudicial; it may be inflammatory and prejudicial but based on evidence; it may be prejudicial and

---

[1]Webster's definition of inflammatory is:

"inflammatory . . .
1: tending to inflame or excite the senses 2: tending to excite anger, animosity, disorder, or tumult: SEDITIOUS . . ." Webster's *Third New International Dictionary*, 1966 at 1159

He defines "inflame" as:

"inflame . . .
2: to excite (as passion or appetite) to an excessive or unnatural action or heat: INTENSITY, ROUSE . . . 3a: to provoke to anger or rage: EXASPERATE, IRRITATE, INCENSE, ENRAGE . . ." Webster, *supra*, at 1159

based on evidence but not inflammatory (indeed, all prosecutions are designed to be prejudicial to all defendants); it may be inflammatory and based on evidence but not prejudicial; and it may be unsupported by evidence but neither prejudicial nor inflammatory.

Underlying all of the above factors is the obvious requirement that the argument be at least relevant to the business at hand.

It is this test which, when measured in terms of the narrow standard of due process, must be applied in order to determine whether petitioner was deprived of a fair trial. Remembering that he who claims unfairness must show it in terms of demonstrable reality and not as the result of speculation, *Buchalter v. New York*, 319 U.S. 427 (1943), let us

examine the specific allegations of constitutional error.

Regarding McDaniel's remarks which expressed the rather obvious desire to prosecute the Division of Corrections, petitioner claims that they have no rational relationship to the question of guilt or innocence. With that contention respondent could not more heartily agree; they bore no relationship to the question whatsoever. That the remarks were utterly irrelevant is cheerfully conceded. However, were they prejudicial? How could the prosecutor's personal contempt for the Division of Corrections *a priori* have affected the determination of whether petitioner was guilty or innocent? Indeed, the statements could just as easily have inured to petitioner's benefit since they tended to shift blame for the crimes on

someone else. It is entirely possible that defense counsel realized this and by not objecting, hoped that the impression of transferred culpability would remain with the jury. The prosecutor was neither demanding nor inviting the jury to return a guilty verdict in order to either strike a blow or otherwise "get at" the persons responsible for petitioner's furlough. He did not tell the jury that by convicting petitioner they could punish his keepers. Such does not logically follow and is therefore a far different situation than found in *Malley v. Connecticut, supra*. At best, these particular remarks did more harm to the prosecutor's image than to petitioner's rights. Surely, the individual character profiles of the jury (R-Vol.III, pp 3-176) demonstrated that those people were

intelligent enough to pay little or no attention to the prosecutor's comments relating to this matter. Moreover, the jury was specifically instructed that arguments of counsel were not evidence (A-103-104; R-Vol.III p. 186).

Of significant importance is the additional factor that in responding to McDaniel's remarks, defense counsel clearly neutralized any improper effect thusly:

> "MR. GOODWILL: . . . Mr. McDaniel got up here and he really didn't talk too much evidence he talked about how horrible it was and all of this. Then he proceeded to try the Division of Corrections. He tries Mr. Darden's girl friend who, by the way, the State could have also produced, she was along on that trip. He tries Mr. Maloney, and I think he was getting awfully close to trying me.
>
> "Well, we're only in this courtroom for one purpose, and that is to try the guilt or innocence of this man sitting at this table. What the Division of Corrections

> may or may not do or what I agree or disagree with their policies, or whether Mr. McDaniel agrees or disagrees with their policies, *we're not here for that*. You do that another time if that's an important issue." A-143 (emphasis added)

Obviously therefore, if, as petitioner contends, the jury was naive enough to have been improperly influenced by McDaniel then it was equally receptive to rehabilitation by Goodwill. We, of course, submit that the jury was sophisticated enough to have already known what defense counsel told them.

Petitioner has little use for McDaniel's statement to the effect that the only way to have kept petitioner from once again being loose in public was to convict him. While this remark may be troublesome at first glance, the circumstances demonstrate that it was not fatal to the

cause. Defense counsel Maloney, in the first closing argument the jury heard, repeatedly told the jury that the state, based on evidence it presented, essentially was asking the jury to kill his client (A-105,112,115).

In response to that, McDaniel corrected Maloney and properly told the jury that at that stage in the proceedings, the jury was to determine innocence or guilt and nothing else (A-122). He then elaborated on the function and scope of the advisory hearing. It was at this point that he made the remarks about which petitioner complains. In proper context, the statements appear thusly:

> "MR. McDANIEL: . . . Some of the remarks I heard in the opening argument by Mr. Maloney that I want to remember I disagree with, with his interpretation of the law. You take the law from the Judge. He

said that we are asking you to kill this man on this evidence.

"Well, he is wrong, of course. I think he knows he is wrong. The Court will tell you at the end of the argument in the Jury instructions at this point, *you are merely to determine his innocence or guilt, nothing else, whether he is guilty or innocent.* And after you return that verdict of guilty of first degree murder, robbery, and assault with intent to commit murder, the Court will impose a sentence on Count No. 2 and 3, which is robbery and assault with intent to murder, and then you will be asked at that time to go back and retire and advise the Court whether or not he gets the death sentence or whether he should get life.

"That is an advisory opinion on your part, and it has nothing to do with this trial, and Mr. Maloney knows that. But I am sure that I want you to remember Mr. Maloney's opening statement, opening argument when he called this person an animal. Remember that, because I will guarantee you I will ask for the death. There is no question about it.

"The second part of the trial I will request that you impose

the death penalty. I will ask you to advise the Court to give him death. That's the only way that I know that he is not going to get out on the public. It's the only way I know. It's the only way I can be sure of it. It's the only way that anybody can be sure of it now, because the people that turned him loose--this man served his time and if this man served his time as the Court has sentenced him, that's fine. If he's rehabilitated, fine. But let him go home on furloughs, weekend passes--not home, strike that, excuse me--go over with his girl friend for the weekend, go shoot pool for the weekend, go sell his guns, or gun, for the weekend, go consume drink in the bars over the weekend." A-122-123 (emphasis added)

Accordingly, these particular remarks were in response to those made by the defense. *Lawn v. United States, supra.* They were necessary to correct the misstatement of the jury's function.

To that portion of petitioner's argument alleging an improper appeal to the jurors' emotions, we respond that the

only element of impropriety was its inflammatory nature. The only thing one can conclude by examining these remarks is that the prosecutor espoused some sort of a notion of "instant justice." That he wished petitioner had been instantly killed, by whatever means, cannot be denied. *But* did he prejudice the jury's determination of guilt? He did not invite the jury to share his view, nor did he inject the jurors personally into the issue. *Cf. Kelly v. Stone*, 514 F.2d 18 (9th Cir. 1975). Once again, the prosecutor engaged in inflammatory irrelevancies. The jury knew this; indeed, they were specifically told so by Goodwill:

> "The State doesn't want to talk about what they don't have. They didn't, they talked about the little bit of evidence they did have and then Mr. McDaniel made an impassioned plea to how many times did he repeat? I wish you

> had been shot, I wish they had blown his face away. My God, I get the impression he would like to be the man that stands there and pulls the switch on him." A-141-142

Goodwill also acknowledged the "viciousness, the horrible nature . . ." of the evidence (A-140). Moreover, Goodwill specifically instructed the jury to ignore and disregard the ravings of the prosecutor and to "reach the verdict on the evidence." (A-143)

As was previously stated, the remark of Prosecutor White was not the "flagrant example" of impropriety that petitioner claims. The same holds true for McDaniel's assertions that petitioner was a liar. Those remarks were prejudicial but not inflammatory. They very definitely had a basis in the evidence; practically everything petitioner presented was

directly contradicted by the state's evidence. The characterization of petitioner's testimony as a lie was permissible since his testimony is part of the evidence; a comment on the evidence is allowed. *United States v. Isaacs*, 493 F.2d 1124 (7th Cir. 1974); *United States v. Spain*, 536 F.2d 170 (7th Cir. 1975). Besides, the jury knew full well that it alone had the privilege of labeling anyone a liar.

The various other remarks petitioner categorizes as generally damning are nothing more than additional examples of either irrelevant comment or in response to existing fact. For example, the remark that defense counsel would "try the Polk County Sheriff's office" as well as both prosecutors constituted nothing more than a recitation of what had already transpired.

The closing argument for the defense contained allegations of criminal negligence on the part of the sheriff's office (A-111) as well as exaggerated expressions of doubt as to all the state's witnesses. When one questions both the integrity of evidence and the competency of those who gathered that evidence, is not that the same as "trying" the state's case?

Although petitioner would deny us refuge in the doctrine of harmless error, we nevertheless seek its saving principles. He relies primarily on *Chapman v. California*, 386 U.S. 18 (1967), which, while factually distinguishable, is nonetheless illuminating as to the application of the doctrine. There, the prosecutor fully utilized a California constitutional provision allowing him to comment on the

defendant's failure to testify. Prior to appeal that provision was declared invalid by this Court. The defendants' convictions were nonetheless affirmed on the basis of harmless error. This Court refused to follow the California Supreme Court and clearly held that when a specific federal constitutional provision is involved, i.e., the right not to be compelled to be a witness against one's self, the harmless error doctrine must be narrowly applied; its operation cannot occur unless the appellate court is convinced beyond a reasonable doubt that the error could not have contributed to the conviction.

Respondent contends that the Fifth Amendment right involved in *Chapman, supra,* is more easily defined and recognized than is the right to a fair trial. The former

is clearly delineated and is virtually absolute. The latter is, at best, indistinct and cannot be defined much less constitutionally measured unless and until the totality of circumstances is reviewed.

When reviewing a Chapman situation, the violation of the right is presumed; the task is to determine if that violation could have reasonably infected the verdict. When reviewing the situation at bar, respondent submits that the trial is presumed to have been fair; it must be determined first, whether a violation occurred and second, whether it rendered the trial unfair. We contend that the harmless error doctrine operates in a case such as this by making the decision whether, if error has been found to exist, the verdict could stand without it. Although rhetorically posed, the question demands an

affirmative answer. Contrary to petitioner's assertion, the evidence of guilt was in fact overwhelming. Had *no* closing argument been made by the state, the jury could and would have still had before it sufficient evidence to convict. As Justice Rehnquist stated in *Schneble v. Florida*, 405 U.S. 427 (1972):

> "Judicious application of the harmless-error rule does not require that we indulge assumptions of irrational jury behavior when a perfectly rational explanation for the jury's verdict, completely consistent with the judge's instructions, stares us in the face." 405 U.S. at 432

Distilled to its essence, resolution of this issue turns rather distinctly upon one salient factor: the intelligence of the jury. To be sure, the average jury is not composed of country bumpkins who are easily persuaded by the exhortations of a carnival barker as he parades

before them his wares of cheap thrills and sordid sights. By virtue of *voir dire* we eliminate that situation. Given the highest possible assurance our system of justice permits, how can it logically be contended that this or any jury reacted in the manner petitioner alleges? Either we dispense with *voir dire* or we do away with closing arguments; either we disallow the choosing of a fair, impartial and *intelligent* jury or we stop arguing our cases to them.

As was so aptly stated by defense counsel Goodwill:

> "Right after that instruction, you will be told by the Judge that it is to the evidence, the words, the pictures, the whole works, the evidence, and to it alone that you are to look for the proof. *You can't prove him guilty on what Mr. McDaniel says, and by the same token, you can't find him innocent on what I say.*" (emphasis

added) at A-155.

It is the intelligence of the jury which actually requires the necessity of objection discussed *infra*. If erroneous conduct has in fact occurred at trial, the mental purity of the jury can still be maintained by objecting and, if appropriate, requesting a curative instruction. The Florida Supreme Court realized this by its reference to *State v. Jones, supra, Darden v. State*, 329 So.2d 287 (Fla. 1976) at 291. However, the rule in *State v. Jones* does not preclude appellate review even in the absence of objection when the defendant's right to due process of law has been violated. See *Thompson v. State*, 318 So.2d 549 (Fla.App. 4th 1975) (citing numerous federal cases).

Terminally, we respectfully submit that if the Court follows the rule set forth in *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150 (1940), and reiterated in *Donnelly v. DeChristoforo*, 416 U.S. 637 (1974), reversal of the conviction is nowise indicated. The remarks, although improper, did not deprive petitioner of a fair trial or due process of law.

Referring to remarks contained in a prosecutor's closing argument, Justice Douglas in *Socony-Vacuum Oil Co., supra*, stated:

> "They were, we think, undignified and intemperate. They do not comport with the standards of propriety to be expected of the prosecutor. But it is quite another thing to say that these statements constituted prejudicial error. In the first place, it is hard for us to imagine that the minds of the jurors would be so influenced

by such incidental statements during this long trial that they would not appraise the evidence objectively and dispassionately. In the second place, this was not a weak case as was Berger v. United States, 295 US 78, 79 L.ed 1314, 55 S. Ct. 629, where this Court held that prejudice to the accused was so highly probable as a result of the prosecutor's improper conduct 'that we are not justified in assuming its nonexistence.' (p. 89.) Cf. New York C. R. Co. v. Johnson, 279 US 310, 73 L ed 706, 49 S.Ct. 300. Of course, appeals to passion and prejudice may so poison the minds of jurors even in a strong case that an accused may be deprived of a fair trial. But each case necessarily turns on its own facts. And where, as here, the record convinces us that these statements were minor aberrations in a prolonged trial and not cumulative evidence of a proceeding dominated by passion and prejudice, reversal would not promote the ends of justice."
310 U.S. at 239,240

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the decision of the Florida Supreme Court, upholding petitioner's judgment and sentence, should be affirmed.

Respectfully submitted,

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